IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1979

PAUL ROLAND HAMILTON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME
COURT OF GEORGIA

79-5904

Supreme Court, U.S.
FILED
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TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered September 6, 1979.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia, which is unofficially reported as Hamilton v. Georgia, __Ga. __, 259 S.E.2d 81 (1979), is annexed as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on September 6, 1979. No motion for rehearing was filed.[1/]

1/ Rule 22(1) of the Rules of the Supreme Court of the United States, requires that a petition for a writ of certiorari to review the judgment of a state court of last resort in a criminal case be filed within 90 days after entry of judgment. The 90-day deadline in this case has expired. Notwithstanding expiration of the 90-day period, this court has discretion in a particular case to entertain a petition filed out-of-time. Taglianetti v. United States, 394 U.S. 316 (1969).

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

1. Whether Ga. Code Ann. §27-2534.1(b)(7) -- which permits as an aggravating circumstance in a capital case that "[t]he offense of murder . . . was outrageously or wantonly vile, horrible or inhuman . . ." -- is unconstitutionally overbroad or vague as applied by the trial jury to petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Ga. Code Ann. §27-2534.1(b)(2)&(7), which is appended as Appendix B, and the Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF FACTS

Petitioner Paul Roland Hamilton ("petitioner") was tried, convicted and sentenced to death on August 4, 1978 in the Superior Court of Chatham County, Georgia for the murder of John Shinall.

The principal prosecution witness against petitioner was Billie Jean Rose, a topless dancer and occasional carnival worker (T. 156, 186) [2/] who met petitioner in Arkansas several weeks before the crime (T. 156) and had travelled with him to

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2/ Each reference to the transcript of petitioner's trial, held July 31-August 4, 1978 in the Superior Court of Chatham County, will be indicated by the abbreviation "T.".

Savannah. At the time of the crime, Miss Rose was working at the Korean Village Lounge tending bar, soliciting customers for drinks and dancing topless (T. 186), while petitioner worked at a carnival in nearby Savannah Beach (T. 157).

On May 14, 1977, after Billie Jean Rose left the Korean Village about 3:00 p.m., she went with petitioner to The Sidepocket Lounge, another bar, several blocks away where she and petitioner each had several beers (T. 158-59). Some time after their arrival, according to Miss Rose, John Shinall, who frequented the bar approximately three times a week (T. 48), approached, introduced himself, began a conversation, and bought Miss Rose and petitioner several drinks each (T. 159, 174). According to police, Shinall had just separated from his common-law wife after a period during which they "were having arguments all the time and bad fights" (T. 60).

After an hour or two (T. 45, 159), Shinall, Miss Rose and petitioner decided to leave the Sidepocket Lounge for another bar, the Warehouse Tavern (T. 159). Miss Rose left with Shinall in his yellow Chevrolet Camero, while petitioner followed behind in a second car (T. 51, 159).

At the Warehouse, Shinall continued buying drinks -- beer for himself, Margaritas for Miss Rose, some other mixed drinks for petitioner (T. 51-52). The three remained at the Warehouse for over an hour, while Miss Rose shot pool and played the pinball machines (T. 160).

At some point Shinall invited Miss Rose and petitioner to his apartment, according to Miss Rose, to fix something to eat, watch television and return to the Warehouse Lounge (T. 160). At Shinall's house, the three went into the living room and talked for about thirty minutes (T. 161).

Petitioner and Miss Rose differ significantly on what occurred next. According to her story, Miss Rose went into Shinall's kitchen to fix a meal for the threesome. Returning to the living room some twenty minutes later to ask Shinall and petitioner how they wished their steaks to be cooked, she discovered the living room lights out (T. 162).

Although one of the two men asked her not to turn the lights on, she did so and allegedly saw petitioner stabbing Shinall, who lay on a couch (T. 162-63). In a statement later obtained by Texas police, Miss Rose testified that she did not recall Shinall having had any clothes on at this point (T.181)[3/], though she did remember his shoes and socks sitting on the couch (T. 181). (When his body was found, Shinall was nude from the waist down, his trousers at the end of the couch (T. 79).)

According to Miss Rose, she immediately left the house but was soon picked up by petitioner, who by then had left the house and was driving Shinall's yellow Camero with Shinall's

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3/ At trial, Miss Rose acknowledged her statement to Texas police but stated she still "don't remember whether [Shinall] did" or not (T. 181).

television set and his stereo in the car (T. 163-65). She and petitioner left Savannah in Shinall's car, travelled to Atlanta, and spent the night. The two then went to Kentucky, first selling the stereo and television (T. 167).

The two worked briefly at another carnival in Kentucky but parted after Miss Rose was fired (T. 171, 190). Miss Rose then returned to her mother's home in Kirby, Texas. Kirby police initiated questioning of Miss Rose after she described the crime in confidence to a sister who told Miss Rose's mother, who in turn telephoned Texas police (T. 182-83).

Miss Rose testified that neither she nor petitioner had had any plan to rob Shinall when they went to his house to eat (T. 177). She also stated that Shinall never made any sexual advances toward her (T. 170).

Petitioner's account differed from that of Miss Rose in several respects. According to his second statement to police,[4/] after talking in Shinall's living room, he and Billie Jean Rose lay down in the bedroom to rest. He fell asleep and later awoke to the sound of Miss Rose's screams (T. 134). Rushing to the living room, he encountered Miss Rose nude and Shinall over her, apparently ready to rape her (T. 135). He struggled with Shinall, first hitting him five

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4/ Petitioner gave two statements to police within a period of several hours following his arrest. In the first statement petitioner claimed he merely hit Shinall with his fist and left his house (T. 120-22); in the second statement, petitioner acknowledged stabbing Shinall (T. 137-38).

or six times, then stabbing him once or twice (T. 137). He and Miss Rose then decided to take Shinall's stereo, his television and approximately fifty dollars from Shinall's wallet (T. 138-39).

Police who discovered the body several days later reported finding a broken vase, a broken Pepsi-Cola bottle and other signs of a struggle in the living room (T. 71, 82). As indicated, Shinall's body was found nude from the waist down, his pants and shoes resting beside the couch (T. 79-80). Although no male underpants were found at the scene (T. 99), a pair of women's underpants was found on the living room floor (T. 80).[5/] Police reported the bed in the principal bedroom gave the appearance of "having been slept in or laid upon and then not made up" (T. 99).

An autopsy revealed that Shinall had sustained injuries from a blunt trauma and four stab wounds (T. 253). Death resulted from a stab wound through the heart (T. 254-55).

5/ On rebuttal, the State introduced Shinall's estranged, common-law wife who testified the underpants belonged to her daughter Theresa who had lived with Shinall shortly before the crime (T. 203). Miss Rose also denied the underwear was hers (T. 180).

At trial, as indicated, Billie Jean Rose testified on behalf of the State. She was never booked or formally charged with any crime in connection with this incident (T. 97-98).

The trial court submitted the case to the jury on alternative theories, including malice murder, felony murder, and manslaughter (T.243-46). The Court instructed the jury that malice murder "is murder where the plan to kill was formulated by the person killing before he committed the act" (T. 243). The jury acquitted petitioner of malice murder and found him guilty of felony murder (T. 248).

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner's trial jury was instructed that it could consider two statutory aggravating circumstances under Ga. Code Ann. §27-2534.1(b) in determining whether petitioner should be sentenced to death: (i) whether the murder had been committed while petitioner was engaged in the commission of another capital felony, and (ii) whether the crime was "outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim" (T. 265). The jury found both circumstances to be present and recommended a death sentence (T. 270).

The propriety of the application of Ga. Code Ann. §27-2534.1(b)(7) as an aggravating circumstance in this case was not directly raised in petitioner's brief on direct appeal to the Supreme Court of Georgia. However, Ga. Code Ann.

§27-2537(c)(2) expressly requires the Supreme Court of Georgia to ascertain whether "the evidence supports the jury's . . . finding of a statutory aggravating circumstance." The Supreme Court here held that "the evidence supports the jury's findings that this murder was vile, horrible or inhuman in that it involved an aggravated battery to the victim." Hamilton v. Georgia, __Ga.__, 259 S.E.2d 81, 85 (1979).

REASON FOR GRANTING THE WRIT

In Godfrey v. Georgia, 48 U.S.L.W. 3241 (U.S., Oct. 9, 1979)(No. 78-6899), the Court has granted certiorari to consider whether "the Georgia Supreme Court . . . has adopted such a broad and vague construction of Georgia Code Ann. §27-2534.1(b)(7) . . . as to violate the Eighth and Fourteenth Amendments to the United States Constitution."

The murder for which petitioner was sentenced to death occurred during a struggle in a darkened room between two men who had been drinking heavily throughout the afternoon. The victim was found nude from the waist down, and Billie Jean Rose, the only eyewitness other than petitioner, initially confirmed to police that, when she turned on the living room light, she believed Shinall did not have all his clothes on as the two men struggled. Moreover, Miss Rose stated at trial clearly that neither she nor petitioner had any plan to rob Shinall when they came to his home. Both she and petitioner agreed that robbery of Shinall's television set, stereo and automobile was an afterthought.

Shinall's death, though tragic and sordid, did not, petitioner submits, involve conduct significantly more "outrageously and wantonly vile" than that which accompanies any murder. Indeed, both the parties' heavy drinking and innuendos of possible sexual activity which were not fully explored in the trial record are, properly considered, factors weighing against the heinousness of the crime. Yet because of the vagueness and subjectivity of the (b)(7) standard, petitioner's trial jury may well have considered such evidence to aggravate petitioner's offense, demonstrating his "depravity of mind." The broad undefined terminology of (b)(7) -- at least insofar as applied to this crime -- simply cannot provide meaningful jury guidance in making distinctions between those homicides that warrant imposition of a death sentence and those that do not.

The Court should grant certiorari to consider this case together with Godfrey v. Georgia, or, alternatively, should withhold disposition of this petition until Godfrey has been decided.

CONCLUSION

Petitioner prays that a writ issue to review the judgment of the Supreme Court of Georgia.

Respectfully submitted,

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DATED: January 7, 1980

APPENDIX A

ground of uncertainty, and a contract will not be declared void on that ground unless, after reading it and interpreting it in the light of the circumstances under which it was made, and supplying or rejecting words necessary to carry into effect the reasonable intention of the parties, their intention cannot be fairly collected and effectuated'." *Leffler Co. v. Dickerson*, supra.

This contract is not void for vagueness. The intent of the parties seems fairly clear, in light of the circumstances and the nature of the contracting parties. The number of employees as well as their hours is defined; the area to be served is defined; the general nature of the services to be provided is described; insurance classification is set as an objective criteria under which the sufficiency of service can be measured. Judging the contract as a whole, this court cannot agree that it is too vague to bind Metro to any duties.

Finally, so seldom does any government, local, state or federal reduce its size, limit its scope or abolish any agency—so well established is the trend toward ever increasing government and the continual addition of new agencies, it is understandable that this step in the opposite direction should cause such consternation among those directly involved. Nevertheless, we of the Judicial Branch of government are constrained by the Constitution from infringing upon the other branches of government and their authority; to borrow from the sports world vernacular, we are not the coach or the quarterback calling the play; we are the referee or official merely determining whether there has been any infraction of the rules. The Commissioners of Hall County acted within their legal authority when they adopted the contract in question. The petition of the plaintiffs for injunctive relief must be denied.

. The foregoing is the order and judgment written by Judge A. R. Kenyon and entered in this case. It is approved and adopted by this court.

Judgment affirmed.

All the Justices concur.

HAMILTON

v.

The STATE.

No. 35078.

Supreme Court of Georgia.

Argued July 9, 1979.

Decided Sept. 6, 1979.

Defendant was convicted in the Chatham Superior Court, Cheatham, J., of murder and a sentence of death was imposed, and he appealed. The Supreme Court, Undercofler, P. J., held that: (1) there was sufficient evidence to support verdict; (2) trial court did not err in excusing juror for cause where he stated he could never vote for capital punishment regardless of what evidence showed; (3) felony-murder was proper charge under evidence submitted by State; (4) "Report of the Trial Judge," filed as required by statute, did not deprive defendant of independent and impartial review of his conviction; (5) sentence of death was not improperly imposed; and (6) trial court's charge on sentence complied with dictates of *Fleming v. State*.

Affirmed.

1. Homicide ⇐250

Evidence was sufficient to support verdict convicting defendant of murder.

2. Jury ⇐108

Trial court did not err in excusing juror for cause where juror stated he could never vote for capital punishment regardless of what evidence showed.

3. Homicide ⇐308(3)

Felony-murder was proper charge under evidence submitted by State in murder prosecution showing victim's wallet containing some $100, a television set, a stereo, and

a small puppy, were stolen following brutal slaying and defendant's incriminating statement, read into record at trial, that he intended to "hustle lots of money and no problems" from the victim prior to going to victim's house. Code, § 26-1902.

4. Criminal Law ⇐1088.16

In murder prosecution, "Report of the Trial Judge" filed as required by statute, did not deprive defendant of an independent and impartial review of his conviction. Code, § 27-2537(a).

5. Homicide ⇐354

In murder prosecution, sentence of death was not imposed under influence of passion, prejudice or other arbitrary factors; evidence supported jury's findings that murder was vile, horrible or inhuman in that it involved an aggravated battery to victim and that offense of murder was committed while offender was engaged in commission of another capital felony. Code, § 27-2537.

6. Criminal Law ⇐796

In murder prosecution in which sentence of death was imposed, trial court's charge on sentence complied with dictates of *Fleming v. State*.

John F. M. Ranitz, Jr., Savannah, for appellant.

Andrew J. Ryan, III, Dist. Atty., Michael K. Gardner, Asst. Dist. Atty., Arthur K. Bolton, Atty. Gen., Mary Beth Westmoreland, Staff Asst. Atty. Gen., for appellee.

UNDERCOFLER, Presiding Justice.

Paul Roland Hamilton appeals from a sentence of death imposed on August 1, 1978, following his conviction for the murder of John Shinall committed on May 14, 1977, in Chatham County. Following conviction, the jury found the following aggravating circumstances: The offense of murder and other offenses were outrageously vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim, and further found that the offense of murder was committed while the offender was engaged in the commission of another capital felony.

The state presented evidence authorizing a jury to find Hamilton and a girl friend, Billie Jean Rose, met and began drinking with the victim in a Thunderbolt bar, the Sidepocket Inn, on Saturday around 2 p. m. They left around 4 p. m. and went to the Warehouse Tavern, another lounge. Later, Shinall suggested they go to his house to watch t. v., rest, eat and then visit some more bars. At Shinall's apartment, Billie Jean Rose testified she left the men in the living room and tried to prepare some steaks. After 30 minutes, she went to the living room to ask how the men wanted the steaks prepared. The lights were out. Hamilton told her not to turn them on, but she did. Then she saw Hamilton stab Shinall twice. She fled out the back door, picking up a small puppy owned by Shinall when she left. Hamilton took Shinall's wallet, a t. v. and stereo belonging to Shinall and put them in the victim's car. The couple fled Savannah, after abandoning Hamilton's car, and spent the night around Atlanta. They disposed of the t. v., stereo, and later the dog, for cash. In Kentucky, they joined a carnival and soon thereafter Billie Rose was fired for withholding funds from the operator. She went to her home in Kirby, Texas. Hamilton stayed with the carnival.

Meanwhile, Shinall's body was found by police on May 19, 1977, following a complaint by the upstairs tenants of a "bad odor" in the apartment below. Detectives summoned thoroughly investigated the crime scene and testified the victim was found in a sitting position leaning against a living room couch, nude from the waist down. The victim's pants were lying across an end of the couch, his shoes nearby and they found a shirt and t-shirt with blood and a hole in them. The couch was covered with blood; a broken vase was lying partially under the victim's head and there was a shattered Pepsi-Cola bottle on the floor. These glass particles contained blood and hair samples similar to the victim's. No fingerprints were found on any evidence.

A social security identification tag, but no wallet, was found in the trousers. A pair of panties with a heart on them, later identified as belonging to one of Shinall's common law wife's daughters, was also found on the floor near the couch. The detectives testified the scene showed signs of a struggle. The parties stipulated the death of the victim, including the additional facts that the body was in an advanced state of decomposition when found, and that an autopsy showed two primary injury areas: the head with several underlying hematomas and a perforation of the left chest, the latter causing death. The shirt and undershirt found with the body each had a hole consistent with the chest wound.

Billie Jean Rose, Hamilton's girl friend who testified for the state, was located when her mother called the chief of police in Kirby, Texas, and told him her daughter had said she witnessed a murder. Detective Pendergraph went to Texas and interviewed this witness. Following verification of her facts and a second autopsy on the victim's body following exhumation, warrants were issued for Hamilton. He was arrested and returned to Savannah on August 24, 1977. He was interviewed that afternoon about 4 p. m. He received the *Miranda* instructions, voluntarily waived his rights, and answered questions freely. In an initial statement, he said he was invited to Shinall's house, went into the bedroom and "passed out," awakening when Billie Jean Rose called for help. He said he found Shinall and his girl friend half-dressed and his "mind went blank." He swung Shinall around and hit him on the "shoulder bone" with his fist and the victim fell to the floor. He stated he left and wanted to walk back to get his car, but Billie Jean, who he said stayed inside the house a long time, came out sounding "scared" carrying the victim's t. v. and stereo and said they had to take Shinall's car and leave. "To this day, she's never told me what made her nervous . . . the last time I seen the man, he was conscious as I am right now." Advised by detectives he had not told the truth, Hamilton, following a restatement of the *Miranda* instructions, gave a second, conflicting statement, stating he and "B.J." decided to "hustle" Shinall for "lots of money and no problems—we were all drinking . . . ." He reiterated he went to sleep and was awakened by B.J.'s cry for help. She was on the couch with "nothing on . . . ." She said, "Help me! My mind went blank . . . ." He said B.J. hit Shinall with the bottle but he didn't know who she was aiming at. "I got mad and kept hitting him . . . ." He estimated he hit him "5 or 6 times with my fist." He also stated there was "some type of knife . . . I stabbed the man with it . . . ." Hamilton said the last time he saw the knife,[1] it was sticking in his chest. Hamilton checked the billfold, took the dog, t. v. and stereo, took the victim's car and fled to Atlanta. He sold the dog for $10, the t. v. and stereo for $60. He concluded by saying he didn't know the man died. These statements were read into the record without objection.

Billie Jean Rose testified, refuting all allegations by Hamilton that Shinall made any sexual advances toward her. She stated when they arrived at the Shinall apartment, the men went in the living room; she went to the kitchen to prepare some steaks, caused a small fire on the stove that she put out and then she returned to the living room to ask how the men wanted their steaks prepared. The lights were out. Hamilton told her not to turn the lights on, but she did. She saw Hamilton stab Shinall twice. She fled out the back door with Shinall's puppy and Hamilton came out later with the t. v. and the stereo, took the victim's car and they fled.

The state relied upon the theory that Hamilton went to Shinall's house with the intention of robbing the victim, killing him in the process. After the killing, Hamilton partially disrobed Shinall and placed the panties on the floor to give substance to his story that the victim was attempting to rape "B.J." Hamilton, who did not testify and offered no evidence in his defense, pro-

1. The knife was never found.

ceeded upon the theory that he was justified in killing Shinall to protect his girl friend from rape.

A final witness for the state, Cora Henderson, Shinall's common law wife, testified and corroborated Billie Jean Rose's testimony that the panties found near the couch were not hers. This witness testified the panties belonged to her young daughter.

The trial court charged the jury on malice murder, felony murder, voluntary manslaughter, not guilty by reason of justifiable homicide and not guilty. Counsel for defendant had no objections respecting the charge, stating he thought "that's a pretty accurate summary, your honor."

Following conviction, the state presented evidence in aggravation as follows: Dr. Larry Howard, Director of the State Crime Lab, testified Shinall's body exhibited four blunt traumas and four stab wounds. The first stab wound was in the left chest. It went through both shirts, the ribs and penetrated the heart. There was a stab wound on the right side of the head, penetrating the lobe of the ear and another penetrated the cartilage of the ear into, but not through the skull. There was a fourth stab wound in the right side of the head near the top in the back. Also, a blunt instrument had lacerated the scalp to the bone on top of the head, on the side over the right ear and on the right side of the head toward the back. In Dr. Howard's opinion, the blows caused unconsciousness and caused considerable bleeding. The stab wounds were caused by a blunt-ended, sharp weapon. Hamilton offered no evidence in mitigation.

The court charged the jury they must first determine if an aggravating circumstance existed before they would be authorized to find the death penalty. He charged they must find the existence of either or both of the following statutory aggravating circumstances existed beyond a reasonable doubt: (1) The offense of murder was committed while the offender was engaged in the commission of another capital felony or aggravated battery. (2) The offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery on the victim. He specifically charged that the jury was to review all the evidence presented by the state and the defendant throughout the trial, including evidence in mitigation which was defined.

The jury found the existence of both aggravating circumstances charged and recommended the death penalty. We affirm.

[1] 1. The evidence set forth, ante, was sufficient to support the verdict. A rational trier of fact could have found proof of guilt beyond a reasonable doubt. Enumerations 1–4 are without merit.

[2] 2. The trial court did not err in excusing the juror, Mr. Baker, for cause where, as here, he stated he could never vote for capital punishment regardless of what the evidence showed. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Corquodale v. Stynchcombe*, 239 Ga. 138, 140(4), 236 S.E.2d 486 (1977). Enumeration 5 is without merit.

[3] 3. Felony murder was a proper charge under the evidence submitted by the state showing the victim's wallet containing some $100, a television set, a stereo, and a small puppy, were stolen following the brutal slaying and the defendant's incriminating statement, read into the record at trial, that he intended to "hustle lots of money and no problems" from the victim prior to going to the victim's home. The jury could reasonably find from the evidence beyond a reasonable doubt that Hamilton knocked Shinall unconscious and stabbed him to death during the commission of the robbery. Code Ann. § 26–1902; *Edwards v. State*, 233 Ga. 625, 212 S.E.2d 802 (1975). See also *Hicks v. State*, 232 Ga. 393, 207 S.E.2d 30 (1974) and *Moore v. State*, 233 Ga. 861, 864, 213 S.E.2d 829 (1974). Enumeration 6 is without merit.

[4] 4. The appellant's contention that the "Report of the Trial Judge," filed as required by Code Ann. § 27–2537(a), deprived him of an independent and impartial

review of his conviction is not supported by citation or statement of how he was harmed thereby. Enumeration 7 is without merit.

[5] 3. We find the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor; that the evidence supports the jury's findings that this murder was vile, horrible or inhuman in that it involved an aggravated battery to the victim and that the offense of murder was committed while the offender was engaged in the commission of another capital felony. The sentence is not disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. Code Ann. § 27-2537. In reviewing the sentence, we considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed, and we find the following similar cases listed in the appendix support affirmance of the death penalty. The evidence supports the aggravating circumstances found by the jury.

[6] We have also reviewed the trial court's charge on the sentence and find it complies with *Fleming v. State*, 240 Ga. 142, 146, 240 S.E.2d 37 (1977) and *Hawes v. State*, 240 Ga. 327, 334, 240 S.E.2d 833 (1977).

Judgment affirmed.

All the Justices concur.

APPENDIX

Similar cases considered by the court: *Johnson v. State*, 226 Ga. 311, 175 S.E.2d 840 (1970); *Pass v. State*, 227 Ga. 730, 182 S.E.2d 779 (1971); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1974); *Berryhill v. State*, 235 Ga. 549, 221 S.E.2d 185 (1975); *Birt v. State*, 236 Ga. 315, 225 S.E.2d 248 (1976); *Bowden v. State*, 239 Ga. 821, 238 S.E.2d 905 (1977); *Spraggins v. State*, 240 Ga. 759, 243 S.E.2d 20 (1977); *Holton v. State*, 243 Ga. 312, 253 S.E.2d 736 (1979).

APPENDIX B

Ga. Code Ann. §27-2534.1(b)(2)&(7)

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

* * *

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

* * *

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Supreme Court, U. S.
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JAN 31 1980
MICHAEL RODAK, JR., CLERK

NO. 79-5904

PAUL ROLAND HAMILTON,

Petitioner,

v.

78-6199

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF GEORGIA

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Gregg v. Georgia, 428 U.S. 153 (1976)..... 4

Hamilton v. State, 244 Ga. 145, 259 S.E.2d 81 (1979)..... 2

STATUTES CITED:

Ga. Code Ann. § 27-2534.1..... 2

Ga. Code Ann. § 27-2537..... 4

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5904

PAUL ROLAND HAMILTON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

QUESTION PRESENTED

WHETHER THIS COURT SHOULD CONSIDER THE CONSTITUTIONALITY OF GA. CODE ANN. § 27-2534.1(b)(7) WHEN THE FEDERAL QUESTION WAS NOT PRESENTED TO THE STATE COURTS FOR CONSIDERATION.

STATEMENT OF THE CASE

Petitioner, Paul Roland Hamilton, was indicted in Chatham County, Georgia, during the June Term of 1977 for the murder of John A. Shinall. (R. 3, 4). Petitioner was found guilty pursuant to a jury trial and on August 4, 1978, was sentenced to death. (R. 9).

The jury found that the death penalty should be imposed based on the existence of two statutory aggravating circumstances. The jury found that "the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. . ." and "the offense of murder was committed while the offender was engaged in the commission of another capital felony . . ." (R. 8) Ga. Code § 27-2534.1(b)(2) and (7).

Petitioner's motion for a new trial was denied and a notice of appeal was filed to the Georgia Supreme Court. On direct appeal, the Georgia Supreme Court affirmed the conviction and the death sentence. Hamilton v. State, 244 Ga. 145, 259 S.E.2d 81 (1979). A detailed factual narrative can be found in the opinion of the Georgia Supreme Court.

Petitioner now seeks to have this Court review the decision of the Georgia Supreme Court by way of a petition for a writ of certiorari.

REASON FOR NOT GRANTING THE WRIT

I.

THIS COURT SHOULD REFUSE TO CONSIDER THE ISSUE RAISED BY THE PRESENT PETITION AS THERE IS NO FEDERAL QUESTION RAISED WHICH WAS PROPERLY PRESENTED TO THE STATE COURTS FOR A DECISION.

The Petitioner attempts to attack the constitutionality of Ga. Code Ann. § 27-2534.1(b)(7) for the first time in a petition for certiorari in this Court. Petitioner admits that the issue was not directly raised in the state courts and was not decided by the Supreme Court of Georgia. (Petitioner at 7). Petitioner now seeks to assert that the Georgia statute setting out one of the aggravating circumstances that would support the imposition of the death penalty presents a vague and subjective standard and is unconstitutional as applied to the Petitioner.

This Court has held on numerous occasions that it will not decide federal constitutional issues raised for the first time in this Court on review of a state court decision. Cardinale v. Louisiana, 394 U.S. 437 (1969). In the present case, the Petitioner has attempted to raise as his sole federal question, one that was never raised, preserved or passed upon in the state court. This Court has noted that in a federal system "it is important that state courts be given the first opportunity to consider the application of state statutes in light of constitutional challenges." Cardinale at 439. Thus, Respondent submits that this Court should refuse to review this issue as the Georgia state courts have not had an opportunity to pass on the federal question raised.

Petitioner asserts that even though the challenge was not directly raised, the Georgia Supreme Court impliedly considered the issue in its review of the sentence imposed in this case. Under Ga. Code Ann. § 27-2537, the Georgia Supreme Court automatically reviews any death sentence imposed. In the case at bar, the Georgia Supreme Court considered the sentence and found "that the evidence supports the jury's findings that this murder was vile, horrible or inhuman in that it involved an aggravated battery to the victim and that the offense of murder was committed while the offender was engaged in the commission of another capital felony." Hamilton, 244 Ga. at 150. The Court did not consider the constitutionality of the application of the statute, but merely found that there was sufficient evidence to support the jury's finding of the statutory aggravating circumstances. This is not sufficient to find that the Court considered the federal question raised in this case.

Even if this Court should not find a procedural bar to the present petition, this Court should decline to consider the issue on substantive grounds. This Court has previously considered the entire statutory scheme for implementing and reviewing the death penalty in Georgia. In Gregg v. Georgia, 428 U.S. 153 (1976), this Court looked at the Georgia sentencing system as a whole. This Court noted that the Petitioner in Gregg had attacked the seventh aggravating circumstance, as does the Petitioner in the present case, and the Court found that there is no reason to assume the Georgia Supreme Court would use an open ended construction of the statute. Gregg, supra at 200-201. This Court held that the statutory system in Georgia did not violate the Constitution of the United States.

Petitioner further asserts that this Court should consider this case because this Court has granted certiorari in Godfrey v. Georgia, 48 U.S.L.W. 3241 (Oct. 9, 1979). In Godfrey, this Court granted certiorari to consider the following question:

> "In affirming the imposition of the death sentence in this case, has the Georgia Supreme Court adopted such a broad and vague construction of Ga. Code Ann. § 27-2534(b)(7) as to violate the eighth and fourteenth amendments?"

Godfrey, supra (Emphasis added). Thus, this Court has granted certiorari in Godfrey to consider the application of the statute to the facts in that case. There is no implication that the statute is unconstitutional on its face or as applied in all cases.

Furthermore, this case is distinguishable from the case in Godfrey. In Godfrey, the jury sentenced the defendant to the death penalty based only on the seventh statutory aggravating circumstance. Godfrey v. State, 243 Ga. 302, 310, 253 S.E.2d 17 (1979); Ga. Code Ann. § 27-2534.1(b)(7). In the case at bar, the jury found not only that "the offense of murder was vile, horrible or inhuman in that it involved an aggravated battery to the victim. . ." but also found the second aggravating circumstance, that is, that "the offense of murder was committed while the offender was engaged in the commission of another capital felony." Hamilton, 244 Ga. at 150; Ga. Code Ann. § 27-2534.1(b)(2). Thus, even were this Court to find a constitutional deficiency in the seventh aggravating circumstance, there would still be sufficient evidence to uphold the death sentence based on the jury's finding of the second aggravating circumstance. Respondent

asserts that even if the federal question had been properly presented to the state court, there is no reason for this Court to consider the application of the code section to the case at bar as it would not serve to vacate the death sentence.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court to deny the petition for a writ of certiorari filed on behalf of Paul Roland Hamilton.

Respectfully submitted,

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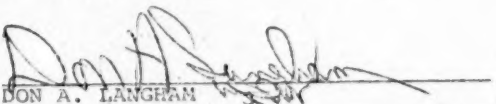

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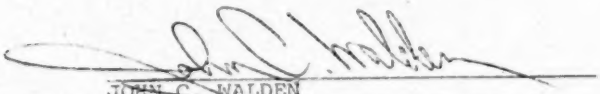

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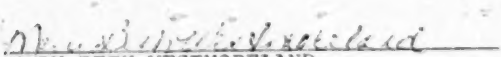

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CERTIFICATE OF SERVICE

I, John C. Walden, counsel of record for the Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States Mail, with proper address and adequate postage to:

John Charles Boger
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and

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This 24th day of January, 1980.

JOHN C. WALDEN